Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

KEYSTONE LAND & DEVELOPMENT COMPANY,
Petitioner,

v.

XEROX CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Erie v. Tompkins requires a federal court in diversity cases to apply applicable state substantive law. The certification process has evolved as an efficient procedure for allowing a federal court to request the highest court of a state to determine unresolved questions of local law. In this summary judgment proceeding the Ninth Circuit certified to the Washington State Supreme Court the question of whether, consistent with the modern trend of contract law, Washington law would recognize an agreement to negotiate a future contract "under the circumstances presented in this case."

In addition to providing guidance as to Washington law, the Ninth Circuit empowered the Washington State Supreme Court to actually decide this case by applying the law, as determined by it, to the specific facts of this case. In response, the Washington State Supreme Court concluded that a contract to negotiate had not been formed between the parties. The Ninth Circuit thereafter adopted the Washington State Supreme Court's decision as representing a definitive and dispositive expression of Washington law.

Thus, the following question is presented for this Court's consideration:

Whether a federal court which has certified to a state court an unresolved question of local law may also delegate to the state court responsibility for the application of the law to the facts of the case, as determined by the state court to be relevant, thereby allowing the state court's decision to be dispositive of the case over which the federal court has exclusive jurisdiction.

PARTIES TO THE PROCEEDING

Petitioner is Keystone Land & Development Company ("Keystone"), a Washington corporation which has no parent corporation. No publicly held company owns 10% or more of Keystone's stock. Keystone was the plaintiff/counter-defendant in the proceedings below.

Respondent is Xerox Corporation ("Xerox"), a New York corporation. Xerox was the defendant/counter-claimant in the proceedings below.

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PETITION FOR WRIT OF CERTIORARI

Keystone respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit (the "Court of Appeals") affirming the entry of summary judgment by the United States District Court for the Western District of Washington (the "District Court") in favor of Xerox. Based on the clearly erroneous and unprecedented application of the certification process adopted by the Court of Appeals, Keystone further requests the Court to consider ordering the summary reversal of the Court of Appeals' decision.

OPINIONS BELOW

The Court of Appeals' Certification Order (App. E at 24a-34a) is reported at 353 F.3d 1093. The Court of Appeals' Clarification Order, which was not published, is attached as App. D at 20a-23a. The opinion of the Washington State Supreme Court (App. C at 9a-19a) is reported at 152 Wn.2d 171, 94 P.3d 945. The Court of Appeals' opinion (App. B at 2a-8a) is reported at 378 F.3d 949. The Court of Appeals' unpublished order denying Keystone's Petition for Rehearing is attached as App. A at 1a.

JURISDICTIONAL STATEMENT

The Court of Appeals' decision was entered on August 4, 2004. Keystone timely filed a Petition for Panel Rehearing. The Court of Appeals denied Keystone's petition on September 7, 2004. App. A at 1a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

Article III. Section 1. The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . . .

Article III. Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . - to Controversies between two or more States; - between a State and Citizens of another State; - between Citizens of different States . . . .

United States Code:

§1332. Diversity of citizenship; amount in controversy; costs.

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between -

(1) citizens of different States;

. . .

(c) For the purposes of this section and section 1441 of this title –

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . . .

Revised Code of Washington:

RCW 2.60.020. Federal court certification of local law question.

When in the opinion of any federal court before whom a proceeding is pending, it is necessary to ascertain the local law of this state in order to dispose of such proceeding and the local law has not been clearly determined, such federal court may certify to the supreme court for answer the question of local law involved and the supreme court shall render its opinion in answer thereto.

STATEMENT OF THE CASE

Keystone commenced litigation against Xerox for breach of contract based on Xerox's refusal to sell its office building to Keystone. Alternatively, Keystone claimed that Xerox at a minimum breached a separate and distinct contract obligating Xerox to negotiate the terms of a formal Purchase and Sale Agreement for the building's sale. The District Court, having jurisdiction under 28 U.S.C. §1332 based on diversity of citizenship, granted Xerox's motion for summary judgment as to both contracts alleged by Keystone. Keystone timely filed an appeal with the Court of Appeals.

The Court of Appeals affirmed the District Court's summary judgment as to the existence of a contract to sell the building. However, after specifically recognizing that "the modern trend in contract law" as well as "[m]any modern commentators" support the enforceability of a contract to

negotiate such as asserted by Keystone, the Court of Appeals concluded that Washington "contract law is not entirely settled" on this important issue. Consequently, the Court of Appeals certified the following question to the Washington State Supreme Court (the "Supreme Court") pursuant to Washington's Federal Court Local Law Certificate Procedure Act, RCW 2.60.010 *et seq.*: "Will Washington contract law recognize and enforce an agreement, whether implicit or explicit, between two or more parties to negotiate a future contract ***under the circumstances presented in this case***?"[1] Certification Order, App. E at 33a (emphasis added).

During oral argument before the Supreme Court Chief Justice Alexander expressed his misgivings about being requested to answer the certified question "under the circumstances of this case." He was specifically "bothered" by the fact that the Supreme Court was "supposed to look at the Ninth Circuit record and say, 'you're out of court or you're in court.'" Chief Justice Alexander believed that the Supreme Court was being requested to "decide the Ninth Circuit's case for them." Excerpts From Oral Arguments in the Supreme Court, App. F at 37a. Chief Justice Alexander even questioned "[i]sn't that the federal judges' job to decide . . . how to apply the law under the circumstances of this case? Why was that in there?" *Id.*

Motivated primarily by the obvious confusion expressed by the Supreme Court, prior to the Supreme Court's issuance of its decision Keystone filed with the Court of Appeals a Motion for Clarification of the Certification Order.

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[1] The Court of Appeals also certified a second question as to "the proper measure of damages for the breach of a contract to negotiate." The Supreme Court declined to consider this question.

Specifically acknowledging that "there were some expressions of concern by members of the [supreme] court to deciding the ultimate issue in this specific case, as opposed to providing a general statement of Washington contract law," the Court of Appeals nevertheless emphasized that it "did ask for an opinion [from the Supreme Court] as applied to this case . . . [in order] to make the certified question dispositive of the case." Clarification Order, App. D at 21a-22a. The Court of Appeals explained that it intentionally framed the certified question "with the view that would make it more likely that the Washington State Supreme Court would be willing to accept certification, spend its valuable time, and express its view on the applicable Washington law of contract." *Id.*

As actively encouraged by the Court of Appeals, the Supreme Court proceeded to decide *Keystone v. Xerox* on its merits. Declining to definitively resolve whether Washington contract law will ever recognize the enforceability of an agreement to negotiate, the Supreme Court nevertheless "answer[ed] the first question, under the circumstances presented in this case, no." Supreme Court Opinion, App. C at 10a-11a. The Supreme Court, based exclusively on its review of certain correspondence exchanged between Keystone and Xerox, concluded that a contract to negotiate had not been formed. The Supreme Court found that "[t]he parties did not exchange promises to conform to a specific course of conduct during negotiations, such as negotiating in good faith, exclusively with each other, or for a specific period of time . . . . There was never an agreement as to how the parties were required to proceed." Supreme Court Opinion, App. C at 17a-18a.

The Court of Appeals without question or comment adopted the Supreme Court's resolution of the case. The Court of Appeals concluded that "in accord with the law as

determined by the Washington State Supreme Court," Keystone's challenge to the District Court's grant of summary judgment was "resolve[d]." Court of Appeals Opinion, App. B at 6a. Accordingly, the Court of Appeals "affirm[ed] the district court's grant of summary judgment to Xerox based on the answer provided by the Washington State Supreme Court." *Id.* at 8a.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT'S CERTIFICATION ORDER, AS CLARIFIED, SANCTIONS SUCH AN EXTREME DEPARTURE FROM ACCEPTED AND USUSAL JUDICIAL PROCEEDINGS AS TO REQUIRE THIS COURT'S EXERCISE OF ITS SUPERVISORY POWERS.

A. Overview of the Certification Process.

Article III, Sections 1 and 2 of the Constitution of the United States vest in the federal court system judicial power as to all cases "arising under . . . the Laws of the United States." Statutorily, 28 U.S.C. §1332 specifically designates federal courts as having jurisdiction over cases in which either of the parties, assuming the existence of diversity of citizenship between them, elects to commence the action in or remove it to federal court. Once federal jurisdiction has been invoked, the federal judiciary has exclusive power and responsibility for the ultimate resolution of the controversy.

Since the announcement of the "Erie doctrine"[2] federal courts sitting in diversity cases are required to apply state law

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[2] *Erie R. Co, v. Tompkins*, 304 U.S. 64 (1938).

to resolve substantive law issues. In cases where an important question of state law has not been definitively established, the federal court can elect to request the highest court of the state to answer the question of local law, thereby eliminating the need for the federal court to speculate as to its composition. Most states, including Washington, have adopted statutes specifically authorizing a federal court to certify for determination an undecided "question of local law," with the state's highest court "render[ing] its opinion in answer thereto." RCW 2.60.020.

Upon providing guidance as to local law, the state court has completed its limited role in the certification process. Based on the federal judge's or jury's determination of relevant facts, the federal court must then apply the local law as defined by the state court in discharge of its constitutional and statutory obligations relative to the case pending before it.

B. The Certification Process Adopted by the Court of Appeals in this Case Resulted in an Abdication of the Court of Appeals' Jurisdictional Responsibilities.

The exclusive function of certification is to assist a federal court, in accordance with the principles established in *Erie v. Tompkins*, in determining applicable state law. Indeed, Washington's Federal Court Local Law Certificate Procedure Act specifically authorizes a federal court when "it is necessary to ascertain the local law of this state . . . [to] certify to the supreme court for answer the question of local law involved." RCW 2.60.020. Based on the confusion associated with reconciling "older Washington precedents" with "the modern trend in contract law," it was appropriate for the Court of Appeals in this case to request the Supreme Court's guidance as to whether Washington law would

recognize "an agreement, whether implicit or explicit, between two or more parties to negotiate a future contract." Once the Supreme Court provided its "answer [to] the question of local law," however, its involvement in these proceedings should properly have concluded.

The Supreme Court specifically concluded that it was "unnecessary to decide whether Washington will ever enforce a contract to negotiate," even though this represented precisely the undecided question of local law raised in this case. Supreme Court Opinion, App. C at 17a. Nevertheless, although not directly responsive to the certified question, the Supreme Court proceeded to announce the following essential requirements in Washington for an agreement to negotiate to be valid: an "exchange [of] promises to conform to a specific course of conduct during negotiations, such as negotiating in good faith, exclusively with each other, or for a specific period of time." *Id.*

In a dramatic expansion of the targeted focus of certification on the unresolved issue of local law, the Supreme Court, based on its somewhat limited exposure to the facts of this case, nevertheless decided that "[t]he exchange of letters with which we are presented does not constitute a contract to negotiate." *Id.* Thus, the Supreme Court, in addition to clarifying the essential elements for a valid contract to negotiate, both ***determined the facts*** of this case and ***applied the law*** to these facts concluding that a contract to negotiate was not formed "under the circumstances presented in this case." Based on the answer provided by the Supreme Court, the Court of Appeals simply held that "[u]nder Washington law, as explained by the Washington State Supreme Court, Keystone's evidence does not suffice to establish a contract to negotiate." Court of Appeals Opinion, App. B at 7a.

Whether or not Keystone and Xerox, based on the specialized circumstances surrounding their negotiations, objectively manifested a mutual intent to enter into an agreement to negotiate requires an intensively fact-based, case-specific inquiry. Rather than answering any novel question of local law, the Supreme Court provided its opinion as to how it would decide a fairly routine contract formation case ***as if the case was pending in state court for disposition***. As a result, the Supreme Court actually decided the "ultimate issue in this specific case." As suggested by the Court of Appeals, this made the answer to "the certified question dispositive of the case." Clarification Order, App. D at 21a-22a.

Consequently, the Court of Appeals – the court with "original jurisdiction" over this diversity case based on Article III, Section 2 of the Constitution and U.S.C. §1332(a)(1) – was not the court which actually decided *Keystone v. Xerox*. The Court of Appeals essentially delegated its fact-finding and decision-making responsibilities to the Supreme Court. It then rubber-stamped the state court's decision as constituting a definitive "explanation" of local law. Such a clear abdication of federal judicial responsibility, whether in a certification case or otherwise, is both unprecedented and disturbing as to its significance.[3]

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[3] Keystone's extensive legal research has failed to uncover even a single case, federal or state, in which the certification process was utilized for any purpose other than settling an undecided question of state law. Keystone specifically failed to locate ***any*** case in which certification was used for the purpose of requesting the state court to either determine the facts or apply the law as established through certification to the particular facts of the case. In no case was the state court requested or allowed to provide an answer which was intended to be dispositive of the litigation

C. The Consequences of the Certification Process Adopted by the Court of Appeals are Potentially Devastating to the Operation of the Judicial System.

The complexities of resolving civil disputes are multiplied significantly with the inter-jurisdictional sharing of responsibilities associated with the certification process. Based on the necessity of balancing the interests of state and federal judicial systems, a well-established practice has evolved which carefully and predictably confines the state court's function in certification cases to providing guidance as to the content of local law. At least prior to the Court of Appeals' decision in this case, the federal court has been exclusively responsible for both fact-finding and applying the law, as determined by the state court in response to a certification order, to the facts of the case. The certification process used by the Court of Appeals in this case realigns the carefully developed balance of power between the state and federal judicial systems by ceding to the state court ultimate responsibility for fact-finding and case resolution.

The Court of Appeals' decision in this case, which currently represents the law throughout the influential Ninth Circuit and significant precedent for subsequent cases, approves and encourages a dramatic and disturbing expansion

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pending in federal court.

Confirming Keystone's research, Wright, Miller & Cooper have commented that: "The [abstention] procedure is not needed where certification is used, and an attempt to have the state court make final resolution of a case properly commenced in federal court would raise questions about the state court's jurisdiction over the parties and the finality of its judgment." 17A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* §4248 at 175 (2d ed. 1988).

of the certification process. Based on the authority of *Keystone v. Xerox*, a federal district court or court of appeals is now justified in delegating its jurisdictional control over a case to a state court to engage in fact-finding and even the ultimate disposition of the case on its merits. The federal court in which the case is actually pending, according to the Court of Appeals, can then simply adopt the state court's decision as an authoritative "explanation" of applicable state law. In addition to constituting an abdication of judicial responsibility, the certification model sanctioned by the Court of Appeals provides the federal court in complicated or controversial cases with the opportunity to practice "decision ducking" or "case avoidance" by simply referring the case to the state court for resolution. Although the state court is free to either refuse to answer or reframe the certified question a state court will rarely decline to answer a specific question asked by a federal court.

In addition to creating serious jurisdictional problems, the certification process employed by the Court of Appeals in this case results in the creation of nothing less than judicial chaos. As clearly demonstrated by the state and federal decisions produced in this particular case: confusion was created as to the respective roles and responsibilities of the involved federal and state court systems; mistakes were made as to the proper standards of judicial review; disputed factual issues were misunderstood or overlooked; federal and state court published opinions are in clear conflict as to the existence and significance of factual disputes; the certification statute's limited scope was exceeded; the litigants were denied the opportunity to argue the application of the law, as recently announced by the state court, to the specific facts of the case; and, most significantly, a state court actually decided a relatively straightforward contract formation case over which a federal court has exclusive jurisdiction. In short, the

creation of bad law is an inevitable consequence of such a process.

1. The Supreme Court Was Confused By the Certification Process Adopted by the Court of Appeals.

The Supreme Court, presumably busy with a docket full of cases properly before it, was justifiably confused as to what to do with *Keystone v. Xerox*. Chief Justice Alexander somewhat incredulously questioned why the Supreme Court was being "bothered" with "decid[ing] the Ninth Circuit's case for them," when after all it was "the federal judges' job to decide . . . how to apply the law under the circumstances of this case." Excerpts From Oral Arguments in the Supreme Court, App. F at 37a. Nevertheless, presumably out of respect for and in deference to the Court of Appeals, the Supreme Court proceeded to decide the case on its merits as specifically urged by the Court of Appeals in its Clarification Order. Clarification Order, App. D at 22a.

2. The Supreme Court Erred by Applying the Wrong Standard of Review in this Summary Judgment Proceeding.

This case was before the Court of Appeals on cross-motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. As such, the court properly "must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact . . . . [The court] must not weigh the evidence or determine the truth of the matter but only determine whether there is a genuine issue for trial." *Meade v. Cedarapids, Inc.*, 164 F.3d 1218, 1221 (9th Cir. 1999). Furthermore, "the issue of material fact required by

Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence . . . . Put another way, if a rational trier of fact might resolve the issue in favor of the nonmoving party, summary judgment must be denied." *T.W. Elec. Service v. Pacific Elec. Contractors*, 809 F.2d 626, 630-31 (9th Cir. 1987).

The Supreme Court, by deciding the "ultimate issue" in disposing of this case, either ignored or overlooked the above-referenced summary judgment review standards when it decided that "[t]he exchange of letters with which we are presented does not constitute a contract to negotiate." Supreme Court Opinion, App. C at 17a. The Court of Appeals by simply adopting the Supreme Court's "explanation" of Washington law similarly concluded that "Keystone's evidence does not suffice to establish a contract to negotiate." Court of Appeals Opinion, App. B at 7a. However, for summary judgment purposes Keystone was not required to conclusively prove the "ultimate issue in this specific case" as to whether a contract to negotiate was actually formed between the parties. Rather, considering all the evidence in a light favorable to its position, Keystone was only required to demonstrate that "a rational trier of fact might resolve the issue" of contract formation in favor of Keystone. Thus, the well-established standard of review and burden of proof applicable to summary judgment proceedings were inexplicably disregarded in both the Supreme Court's and Court of Appeals' opinions.

3. As Acknowledged by the Court of Appeals, the Facts in this Summary Judgment Proceeding Are Not Established and Disputed.

As clearly recognized by the Supreme Court, in contract formation cases the issue of "mutual assent is normally a question of fact for the jury."[4] Yet, the Supreme Court decided this case based exclusively on its review of a "summary of facts" included in the Court of Appeals Certification Order. These facts were provided for the exclusive purpose of establishing a contextual background for the court's benefit in responding to the certified question. However, the facts of this case were never determined by stipulation, findings of a court or otherwise and they remain unresolved.

Furthermore, assuming as indicated by the Supreme Court that Washington law would enforce at least certain agreements to negotiate, the Court of Appeals specifically concluded that "there are genuinely disputed material facts [in this case] that would permit, though not compel, a rational jury to conclude that a contract to negotiate existed and that, if such a contract is recognized in this type of case, Xerox breached it." Certification Order, App. E at 32a. Despite the Court of Appeals' specific finding relative to the existence of disputed material facts, the Supreme Court erroneously decided this summary judgment proceeding on its merits. This decision was in direct conflict with the Court of Appeals' Certification Order which specifically provided that "a trial will be necessary" to resolve these contested factual issues. *Id.*

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[4] Supreme Court Opinion, App. C at 16a, fn. 10.

Finally, the Supreme Court's decision that a contract to negotiate was not formed in this case was based exclusively on its review of the "exchange of letters with which we are presented." Supreme Court Opinion, App. C at 17a. However, Washington's context rule of contract interpretation requires the intentions of contracting parties to be ascertained by "viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties." *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222, 228 (1990). The Supreme Court's contract formation decision ignores the critical importance of the context of the negotiations between the parties in evaluating their intentions.

4. In Any Event, the Determination of Facts and Application of Law to the Facts of a Case Are Both Inappropriate Functions of the Certification Process and Beyond the Scope of Washington's Certification Statute.

Recognizing that the function of certification is limited to answering unresolved questions of local law, it is well-settled that neither fact-finding nor application of law to the particular facts of a case should appropriately be considered by a court acting under the limited authority of a certification order. *See, e.g. Green v. American Tobacco Company*, 325 F.2d 673, 676 (5th Cir. 1963) (after receiving an answer to a certified question, the federal court ordered a second jury trial because "there was evidence from which the jury could properly conclude that the standard of reasonableness had been breached"); *In re Richards*, 223 A.2d 827, 833 (Me. 1966) (the Supreme Court of Maine refused to answer a certified question because it was apparent from the

certification itself that all material facts were not resolved); *Santasucci v. Gallen*, 607 F.2d 527, 529 (1st Cir. 1979) (rejection of certification by the district court was approved because "[u]nderlying the many difficult legal issues relating to the land claims are a number of disputed factual issues"); *Baker v. America's Mortg. Servicing, Inc.*, 58 F.3d 321, 325 (7th Cir. 1995) ("There may be difficulties in applying Illinois law to the particular facts of a case, but those are not problems which the certification procedure is intended to address"); *Woodbridge Place Apartments v. Washington Square Capital, Inc.*, 965 F.2d 1429, 1434 (7th Cir. 1992) (contract interpretation cases are particularly inappropriate for certification because the court "must look to the particularized language before it and the particularized negotiations between the parties in construing contractual documents"). *See also*, *Pflueger v. Sherman*, 293 U.S. 55 (1934), a case in which this Court refused to answer a question certified to it which involved mixed questions of law and fact, because "[t]he Court cannot be called upon to answer questions of objectionable generality, or to review proceedings, facts and circumstances for the purpose of deciding a variety of preliminary questions in order to reach and decide an ultimate question submitted." *Id.* at 58.

Consistent with the purpose of certification, Washington's Federal Court Local Law Certificate Procedure Act also specifically limits the jurisdiction of the Supreme Court to "answer[ing] the question of local law involved." RCW 2.60.020. Similarly, the federal court's right to request certification in Washington is expressly confined to situations in which "it is necessary to ascertain the local law of this state." *Id.* Thus, the Supreme Court's decision in this case exceeded the limited scope of its jurisdiction over federal court cases as clearly granted by Washington statutory law. The Court of Appeals' request for the Supreme Court to

request for the Supreme Court to dispose of this case was also not authorized by Washington law.

5. Keystone Never Had the Opportunity to Argue this Case Based on the Elements Established by the Supreme Court for a Contract to Negotiate.

The Supreme Court's opinion ***for the first time*** contains a pronouncement of Washington contract law regarding the requirements for an enforceable contract to negotiate. The Supreme Court stated that for such an agreement to be enforceable the parties must "exchange promises to conform to a specific course of conduct during negotiations, such as negotiating in good faith, exclusively with each other, or for a specific period of time . . . . [The contract must include] an agreement as to how the parties were required to proceed." Supreme Court Opinion, App. C at 17a-18a. Although the Supreme Court concluded that "Keystone fails to identify an offer and acceptance to be bound to specific standards of negotiating conduct for the formation of a separate substantive contract,"[5] Keystone's deficiency in this respect is attributable to the fact that, prior to the Supreme Court's decision, it had no knowledge of or reason to know the elements required to be proven in order to establish the existence of an agreement to negotiate. It is fundamental that in summary judgment proceedings "while the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1985). Therefore, prior to the Supreme Court's announcement of Washington contract law relative to agreements to negotiate, Keystone was unable to ascertain the

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[5] Supreme Court Opinion, App. C at 16a.

materiality of the facts which should have been presented for the courts' consideration. Unless the Court of Appeals' decision is reversed, Keystone will never have this opportunity.

II. REVIEW IS WARRANTED BECAUSE BOTH THE SUPREME COURT'S AND COURT OF APPEALS' DECISIONS ARE IN DIRECT CONFLICT WITH THE COURT OF APPEALS' CERTIFICATION ORDER IN THIS CASE.

The Court of Appeals' Certification Order, as clarified, requested the Supreme Court to elect to either: (a) provide "an opinion as applied to this case . . . [in order] to make the certified question dispositive of the case," or (b) "limit its opinion to advising whether, under Washington contract law, a contract to negotiate can be valid and enforceable." Clarification Order, App. D at 22a. The Supreme Court, as outlined above, accepted the Court of Appeals' invitation to dispose of the case on its merits. Although the Supreme Court specifically declined to declare whether Washington contract law would ever enforce an agreement to negotiate a future contract, its opinion clearly delineated the following essential requirements for the existence of such a contract: an exchange of promises to conform to a specific course of conduct during negotiations, such as negotiating in good faith, exclusively with each other, or for a specific period of time. The Supreme Court, at least by implication, confirmed that Washington law would recognize an agreement to negotiate containing these elements.

In its Clarification Order the Court of Appeals clearly indicated that "if the Washington State Supreme Court prefers to limit its opinion to advising whether, under Washington contract law, a contract to negotiate can be valid and

enforceable, then we will apply that law in further proceedings in this appeal." Clarification Order, App. D at 22a. Importantly, the Court of Appeals' original Certification Order concludes as follows:

> Conversely, if the Washington State Supreme Court decides to recognize a contract to negotiate in this case, ***we will reverse the district court's order granting summary judgment to Xerox.*** As we will explain if it is necessary, ***there are genuinely disputed material facts*** that would permit, though not compel, a rational jury to conclude that a contract to negotiate existed and that, if such a contract is recognized in this type of case, Xerox breached it. ***In this case, a trial will be necessary.***

Certification Order, App. E at 32a (emphasis added).

Ignoring the standards of review applicable to summary judgment motions, as well as Washington's context rule for contract interpretation, the Supreme Court's opinion is based on its inaccurate or misguided assumption that no dispute existed as to the relevant facts of this case. Yet, the Court of Appeals specifically emphasized the existence of "genuinely disputed material facts" relating to the decisive issue of the formation of a contract to negotiate. As determined by the Court of Appeals, a trial is necessary to resolve the disputed facts.

The opinions of both the Supreme Court and the Court of Appeals relative to the formation of a contract to negotiate cannot be reconciled with the Court of Appeals' Certification Order. Assuming Washington law will enforce at least certain agreements to negotiate, the Certification Order clearly contemplated the necessity of a trial in this case to

resolve disputed issues of material fact relative to both the formation and breach of the contract. However, the Supreme Court, as endorsed by the Court of Appeals' opinion, summarily decided this case based exclusively on its determination that a contract to negotiate had not been formed between the parties. Such a decision ignored both the existence of disputed facts as expressly acknowledged by the Certification Order and the fact that Keystone, for purpose of summary judgment, in any event did not have the burden of conclusively proving the contract's existence.

Because the Supreme Court effectively disposed of *Keystone v. Xerox* based on the determination that a contract had not been formed, its decision had the practical effect of "overruling" the Court of Appeals' specific findings as to the need for a federal judge or jury to resolve "genuinely disputed material facts." Although the Certification Order specifically required the disputed issues of material fact relative to contract formation to be decided by the District Court at trial, the Supreme Court superceded this determination by inconsistently concluding that the factual disputes specifically acknowledged by the Court of Appeals did not even exist. Amazingly, such a conclusion was predicated exclusively on the Supreme Court's superficial review of the condensed "summary of facts" included in the Certification Order. Such an extreme result was never contemplated by the certification process and is inconsistent with the federal court system's exclusively jurisdictional responsibility for deciding this case.

III. REVIEW IS FURTHER WARRANTED BECAUSE THE COURT OF APPEALS' DECISION CONFLICTS IN PRINCIPLE, IF NOT DIRECTLY, WITH PRIOR DECISIONS OF THIS COURT.

This Court has specifically recognized that "[p]arties are entitled – absent unique and rare situations – to adjudication of their rights in the tribunals which Congress has empowered to act." *Clay v. Sun Insurance Office Limited*, 363 U.S. 207, 228 (1959) (Douglas, J. dissenting). In *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1963), this Court specifically considered a judicial abstention case in which the federal court deferred considering the litigants' constitutional claims pending the state court's determination of the application of a state licensing statute to the dispute.[6] In a decision which recognized the federal court's overarching responsibility for deciding cases properly subject to its jurisdiction, this Court in *England* commented as follows as to the critical importance of the federal court's role as the final decision maker in inter-jurisdictional cases:

> Limiting the litigant to review here [in abstention cases] would deny him the benefit of a federal trial court's role in constructing a record and making fact

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[6] Abstention, similar in concept to certification, is a judge-fashioned vehicle for allowing state courts to resolve undecided questions of state law under the Erie doctrine. Procedurally, abstention involves a somewhat cumbersome process requiring the litigants to commence a separate lawsuit in state court, with the federal court holding the case in abeyance pending the state court's answer to the state law question. The more streamlined certification process has emerged in response to the procedural shortcomings of federal court abstention. *Uniform Certification of Questions of Law Act* (U.L.A.), Prefatory Note.

> findings . . . . "There is always in litigation a margin of error, representing error in factfinding . . . ." ***Thus in cases where, but for the application of the abstention doctrine, the primary fact determination would have been by the District Court, a litigant may not be unwillingly deprived of that determination*** . . . . We made this clear only last Term in *NAACP v. Button*, when we said that "***a party has the right to return to the District Court, after obtaining the authoritative state court construction for which the court abstained, for a final determination of his claim.***"

England at 416-17 (internal citations omitted) (emphasis added).

As a direct consequence of the Court of Appeals' abdication of responsibility in this case, Keystone's right to return to federal court for both fact-finding and case disposition was disregarded. Instead, these important judicial functions were actually completed by the Supreme Court based on a jurisdictional authorization improperly conferred by the Court of Appeals. The importance of Keystone's absolute right to have its claims determined in federal court was emphasized by this Court in both *Clay* and *England*. Consequently, the Court of Appeals' decision is in direct conflict with the principles established in these cases.

CONCLUSION

The Supreme Court of Washington is the final arbiter of Washington law. To the limited extent that the Supreme Court's opinion "answered a question of local law," the Court of Appeals was required to apply such law in its disposition of this case. However, because it should never have

requested or allowed the Supreme Court to decide this case, the Court of Appeals must be ordered to disregard the Supreme Court's conclusions relative to the formation of a contract between Xerox and Keystone. Instead, as the Court of Appeals expressly concluded in its Certification Order, the existence of disputed issues of material fact requires this case to be remanded to the District Court for trial. The jury in District Court must then apply Washington contract law relative to agreements to negotiate, as recently promulgated by the Supreme Court, to the facts the jury determines to be relevant based on the evidence presented at trial. Only then can this case be decided on its merits.

Accordingly, Keystone's petition for a writ of certiorari should be granted. Further, Keystone also respectfully requests the Court to order the summary reversal of the Court of Appeals' decision.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 02-35847

D.C. No. Cv-01-01018-MJP
Western District of Washington, Seattle

[Filed September 7, 2004]

KEYSTONE LAND & DEVELOPMENT COMPANY, Plaintiff-Counter-Defendant-Appellant,	)
v.	)
XEROX CORPORATION, Defendant-Counter-Claimant-Appellee.	)

ORDER

Before: TROTT, FISHER, and GOULD, Circuit Judges.

The Petition for Reheating is **DENIED**.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Case No. 02-35847

[Filed August 4, 2004]

[Resubmitted August 4, 2004, Seattle, Washington]

KEYSTONE LAND & DEVELOPMENT COMPANY, Plaintiff-Counter-Defendant-Appellant,	)
v.	)
XEROX CORPORATION, Defendant-Counter-Claimant-Appellee.	)

Before: Stephen S. Trott, Raymond C. Fisher, and Ronald M. Gould, Circuit Judges. Opinion by Judge Gould.

OPINION: SECOND OPINION

GOULD, Circuit Judge:

This diversity case arises from a contract dispute. Plaintiff Keystone Land & Development Company ("Keystone") claims that it formed two binding contracts with Defendant Xerox Corporation ("Xerox"): a contract to buy a building owned by Xerox, and a contract to negotiate the terms of a Purchase and Sale Agreement for that building. Keystone filed suit for breach of contract in Washington state court and, to secure its claims, Keystone filed a *lis pendens* notice for the property. Xerox removed the case to federal court and filed a counterclaim for damages, and attorney's fees, caused by an allegedly improper *lis pendens*. The district court granted summary judgment to Xerox on its defense of the two contract claims asserted by Keystone, and also granted summary judgment to Xerox on its counterclaim. Keystone appealed these rulings.

In a separate opinion, *Keystone Land & Development Co. v. Xerox Corp.*, 353 F.3d 1070 (9th Cir. 2003) (*Keystone I*), we affirmed the summary judgment dismissing Keystone's claim of a breach of contract to sell the building, and we reversed the summary judgment awarding damages to Xerox because of the *lis pendens*.

In a companion published order, *Keystone Land & Development Co. v. Xerox Corp.*, 353 F.3d 1093 (9th Cir. 2003) (*Keystone II*), we certified to the Washington State Supreme Court a remaining dispositive question of state law before us, namely, whether Washington law may recognize a contract to negotiate in the circumstances presented by this appeal. The Washington State Supreme Court accepted certification and has resolved the dispositive question that we certified to it. We now return to consideration of the issues that we had deferred while awaiting an answer on state law. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm the district court.

I

We reiterate the facts as set forth in our prior published order in *Keystone II*. In early 2001, Xerox decided to sell and leaseback its facility in Tukwila, Washington. Xerox hired Jones Lang LaSalle ("Jones Lang") and Kidder Matthews and Sanger ("Kidder Matthews") to sell the property. Xerox sent detailed information packets to prospective buyers, including Keystone. In a February 22, 2001 e-mail, Xerox requested a "signed Letter of Intent which includes the net purchase price and key deal points . . . ." Keystone, through its real estate broker, Broderick Group, sent a letter (the "Offer Letter") dated March 8, 2001, that made an "Offer to Purchase" the property. The letter had several contingencies, including the "Execution of a Purchase and Sale Agreement with [sic] thirty (30) days from the execution of this letter of intent." Kidder Matthews replied on April 4, 2001, thanking Keystone for the "Offer" and, as "directed by Xerox," requested that Keystone submit a "final and best offer" for the property that addressed certain concerns. Keystone responded through a letter dated April 6, 2001, by increasing its offering price. Referencing the March 8 letter, the April 6 letter stated that Keystone was "prepared to proceed towards completion of a mutually acceptable Purchase and Sale Agreement." In an April 10th letter, Xerox's local brokers wrote that, subject to two modifications, Xerox was "prepared to negotiate a Purchase and Sale Agreement with Keystone," and that Xerox would "proceed immediately to draft" the Agreement if Keystone accepted the modifications. Keystone accepted the modifications on April 13th.

Keystone prepared to inspect the property and Xerox's books and records concerning the property, reviewed documents, and arranged debt and equity financing. Xerox delivered documents to Keystone and hired legal counsel for

drafting the Agreement. Xerox told Keystone that a draft was almost complete and would soon be ready for review. To this point, no employee of Keystone had discussed the transaction directly with any employee of Xerox; all communications were between the parties' brokers.

Xerox commenced its due diligence review. Because Xerox had seen other prospective property sales collapse when lenders had backed out after learning that the deal included a leaseback to Xerox, it requested assurances from Keystone's lenders that financing would be available. Faced with vague answers from Keystone's financier, a Key Bank officer, Xerox became concerned about Keystone's suitability as purchaser and landlord.

On April 25, 2001, the City of Tukwila, the main competitor of Keystone for the property, submitted a revised proposal to buy the building for $500,000 more than Keystone offered. Xerox then decided to withdraw from negotiations with Keystone. That was the end of negotiations between Keystone and Xerox.

Keystone filed suit in state court on June 20, 2001 and recorded a *lis pendens* against the Tukwila facility. The action was removed by Xerox to the United States District Court for the Western District of Washington. Xerox filed a Fed. R. Civ. P. 12(b)(6) motion, asserting that the complaint did not state a claim. That motion was denied. Xerox then filed an answer on October 4, 2001, and added a counterclaim for damages from the *lis pendens* filing. Keystone released the *lis pendens* when it filed an amended complaint on January 18, 2002. On cross-motions for summary judgment, the district court granted Xerox's motion for summary judgment in defense of Keystone's suit on March 14, 2002. On July 12, 2002, the district court, addressing cross-motions for

summary judgment on Xerox's counter-claim, awarded summary judgment to Xerox. The district court certified both orders as final and Keystone appealed both summary judgment orders.

* * *

We have already affirmed summary judgment for Xerox on Keystone's claim of breach of contract to sell the Tukwila building and we have reversed summary judgment for Xerox on the *lis pendens* counterclaim and ordered summary judgment for Keystone. *Keystone I*, 353 F.3d at 1077. Our consideration now addresses and, in accord with the law as determined by the Washington State Supreme Court on our certified questions, resolves Keystone's challenge to the district court's grant of summary judgment that rejected Keystone's claim of breach of contract to negotiate.

II

On December 31, 2003, we certified the following two questions to the Washington State Supreme Court:

> (1) Will Washington contract law recognize and enforce an agreement, whether implicit or explicit, between two or more parties to negotiate a future contract under the circumstances presented in this case?
>
> (2) If such a contract can exist, what is the proper measure of damages for the breach of a contract to negotiate?

Keystone II, 353 F.3d at 1098. After accepting certification, calling for briefing, and holding oral argument, the

Washington State Supreme Court responded: "We do not reach the issue of whether Washington contract law will ever recognize and enforce an agreement to negotiate a future contract but answer the first question, under the circumstances presented in this case, no. We find it unnecessary to reach the second certified question.", *Keystone Land & Dev. Co. v. Xerox Corp.*, ___ P.3d ___, No. 74904-3, 152 Wn.2d 171, 94 P.3d 945, 2004 Wash. LEXIS 537, (Wash. July 22, 2004) (*Keystone III*). The Washington State Supreme Court elaborated:

We conclude that it is unnecessary to decide whether Washington will ever enforce a contract to negotiate in order to answer the first certified question. The exchange of letters with which we are presented does not constitute a contract to negotiate. The parties did not exchange promises to conform to a specific course of conduct during negotiations, such as negotiating in good faith, exclusively with each other, or for a specific period of time. Instead, the parties began negotiations to enter into a purchase and sale agreement. In the absence of objective manifestations of mutual assent to definite terms supported by consideration, no contract was formed. There was never an agreement as to how the parties were required to proceed.

Under Washington law, as explained by the Washington State Supreme Court, Keystone's evidence does not suffice to establish a contract to negotiate.

III

As we have previously held, this interpretation of Washington law ends the appeal: "If the Washington State Supreme Court gives an opinion that it does not recognize a contract to negotiate in this case, we will affirm the district

court on that basis." *Keystone II*, 353 F.3d at 1098. We therefore affirm the district court's grant of summary judgment to Xerox based on the answer provided by the Washington State Supreme Court. We also express gratitude to the Washington State Supreme Court for accepting and resolving the certified question that is dispositive of this appeal. We will not disturb the district court's decision on summary judgment rejecting Keystone's claim of breach of contract to negotiate.

AFFIRMED.

In light of the partial relief given Keystone in *Keystone I*, the partial affirmance given Xerox in *Keystone I*, and our rejection of Keystone's remaining appeal here, each party shall bear its own costs.

APPENDIX C

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Case No. 74904-3

[Filed July 22, 2004]

KEYSTONE LAND & DEVELOPMENT COMPANY, Appellant	)
v.	)
XEROX CORPORATION, Appellee	)

SUPREME COURT OF WASHINGTON

EN BANC OPINION

CHAMBERS, J.

Keystone Land & Development Company (Keystone) claims Xerox Corporation (Xerox) breached two separate contracts: one to sell its Tukwila facility to Keystone and one to negotiate in good faith a purchase and sale agreement for

the facility. The United States District Court for the Western District of Washington granted Xerox's motion for summary judgment and dismissed Keystone's claims under both contracts. Keystone appealed to the United States Court of Appeals for the Ninth Circuit, which affirmed summary judgment dismissal of Keystone's claims under the substantive contract but seeks this court's answers to two certified questions before deciding the remaining issue on appeal.

(1) Will Washington contract law recognize and enforce an agreement, whether implicit or explicit, between two or more parties to negotiate a future contract under the circumstances presented in this case?

(2) If such a contract can exist, what is the proper measure of damages for the breach of a contract to negotiate?

Keystone Land & Dev. Co. v. Xerox Corp., 353 F.3d 1093, 1098 (9th Cir. 2003).[1] We do not reach the issue of whether Washington contract law will ever recognize and enforce an agreement to negotiate a future contract but answer the first

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[1] After we heard oral arguments on the matter, upon Keystone's request, and over Xerox's objection, the Ninth Circuit issued an order clarifying its intent "to make the[se] certified questions dispositive of th[is] case," while acknowledging our ability to reformulate the questions and limit our opinion to "a general statement of Washington contract law." June 17, 2004 Order at 2. Following the Ninth Circuit's clarification order, Keystone moved this court for permission to submit supplemental briefing on the issue of whether we ought to limit our opinion to a general statement of Washington contract law. Because supplemental briefing is unnecessary, Keystone's motion for permission to submit supplemental briefs is denied.

question, under the circumstances presented in this case, no. We find it unnecessary to reach the second certified question.

FACTS

Xerox decided to sell and leaseback a facility it owned in Tukwila, Washington. Xerox's brokers[2] sent out detailed information packets to prospective buyers, including Keystone, and requested letters of intent containing net purchase price and key deal points. Xerox received many proposals. It was most interested in the proposals received from Keystone and the City of Tukwila and directed its local broker, Kidder, to seek final, best offers from both. Parallel negotiations occurred with Keystone and the City of Tukwila.[3] Keystone claims that the exchange of letters between its broker[4] and Xerox's local broker created two enforceable contracts.[5]

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[2] Xerox hired Jones Lang LaSalle, Inc. to sell the facility, and Jones associated with local real estate broker, Kidder Matthews & Sanger, Inc. (Kidder).

[3] On April 25, 2001, the City of Tukwila's broker responded with its final and best offer, which included a purchase price offer of $500,000 more than the offer made by Keystone. Additionally, the city revised its offer to include a longer leaseback term meeting Xerox's needs.

[4] Broderick Group, Inc. (Broderick).

[5] The District Court found, and the Ninth Circuit affirmed, no substantive contract for the sale and purchase of the facility was formed. *Keystone Land & Dev. Co. v. Xerox Corp.*, 353 F.3d 1070, 1075 (9th Cir. 2003) (hereinafter *Keystone* II).

Through Broderick, Keystone responded to the information packet it received and sent a letter to Kidder titled "offer of purchase." Excerpt of Record (ER) at 9-15. Kidder then sent a letter to Broderick and requested a "final and best offer" that would address some "critical issues," including the purchase price, rent, deposit, and closing date. ER at 93. Broderick responded with a letter back to Kidder amending the purchase price and noting the offer to purchase would expire if not accepted on or before April 16, 2001. On April 10, 2001, Kidder replied and noted that "Xerox is prepared to negotiate a Purchase and Sale Agreement with Keystone Development subject to two modifications to your Proposal."[6] On April 13, 2001,[7] Keystone's president acknowledged and accepted the modifications to its proposal. App. Keystone contends that all of the key terms of the substantive agreement were settled by Keystone's acceptance of the April 10, 2001, letter and that Xerox was obligated to prepare a purchase and sale agreement.

ANALYSIS

We begin by distinguishing between three different but similar types of agreements. The first type of agreement is an agreement to agree. An agreement to agree is "an agreement to do something which requires a further meeting of the minds of the parties and without which it would not be complete." *Sandeman v. Sayres*, 50 Wn.2d 539, 541-42, 314 P.2d 428

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[6] Appendix to this opinion (ER at 18) (hereinafter cited as "App.").

[7] Although the April 10, 2001, letter to Broderick stated that it will expire if not accepted by noon on April 12, 2001, Keystone's president unilaterally changed the expiration date to 5:00 p.m. on April 13, 2001.

(1957). Agreements to agree are unenforceable in Washington. *Id.* (citing cases).[8]

The second type of agreement is an agreement with open terms. Under an agreement with open terms, the parties intend to be bound by the key points agreed upon with the remaining terms supplied by a court or another authoritative source, such as the Uniform Commercial Code. E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 253 (1987) [hereinafter *Preliminary Agreements*].[9]

The third type of agreement is a contract to negotiate. In a contract to negotiate, the parties exchange promises to conform to a specific course of conduct during negotiations, such as negotiating in good faith, exclusively with each other, or for a specific period of time. Under a contract to negotiate, the parties do not intend to be bound if negotiations fail to reach ultimate agreement on the substantive deal. *Preliminary*

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[8] We note, however, that this line of cases has been distinguished from another line of cases in which the enforceability of contract terms to agree upon future rental rates contained within renewal options of completed lease agreements was established. *See, e.g., Family Med. Bldg., Inc. v. Dep't of Soc. & Health Servs.*, 104 Wn.2d 105, 110, 702 P.2d 459 (1985).

[9] Keystone's arguments about the substantive contract appear to hinge on the formation of an agreement with open terms. As noted above, the federal courts have already held there was no binding agreement with open terms for the purchase and sale of the facility. *See supra* n.5; *see also Keystone* II, 353 F.3d at 1075. This question is not before the court.

Agreements, 87 COLUM. L. REV. at 263. In contrast to an agreement to agree, under a contract to negotiate, no breach occurs if the parties fail to reach agreement on the substantive deal. The contract to negotiate is breached only when one party fails to conform to the specific course of conduct agreed upon. No Washington court has directly addressed whether a contract to negotiate is independently enforceable.

Under the principle of freedom to contract, parties are free to enter into, and courts are generally willing to enforce, contracts that do not contravene public policy. *Preliminary Agreements*, 87 COLUM. L. REV. at 267. Xerox does not argue that contracts to negotiate are against public policy. Rather, it argues that, under existing Washington case law, when parties manifest, in any way, that legal obligations shall be deferred until a writing is made, preliminary negotiations and agreements do not constitute a binding contract.

Keystone argues that Washington courts, while not deciding the issue, have implied the enforceability of a contract to negotiate. For example, in *Badgett v. Security State Bank,* 116 Wn.2d 563, 807 P.2d 356 (1991), borrowers sought to modify an existing loan agreement, and when the bank refused to consider the borrowers' proposal, the borrowers brought suit claiming the bank breached a duty to negotiate modifications in good faith. *Id.* at 566-67. In holding the bank was under no obligation to negotiate modifications in good faith, we implied that if there had been an express provision in the loan agreement imposing such a duty, then it would have been enforceable. *Id.* at 573 ("[T]he Badgetts are not asking this court to interpret any provision in the loan agreement as imposing a duty on the Bank to consider their proposals...").

Our holding in *Badgett* supports a conclusion that, under Washington contract law, a specific course of conduct agreed upon for future negotiations is enforceable when it is contained in an existing substantive contract. However, *Badgett* does not answer the question of whether an enforceable obligation to negotiate in accordance with an agreed upon course of conduct can exist independently from an existing substantive contract. Although there is a duty of good faith and fair dealing implied in all existing contracts, we have consistently held there is no "free-floating" duty of good faith and fair dealing that is unattached to an existing contract. *E.g.*, *id.* at 569-70. The duty exists only "in relation to performance of a specific contract term." *Id.* at 570.

Washington follows the objective manifestation test for contracts. *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 699, 952 P.2d 590 (1998). Accordingly, for a contract to form, the parties must objectively manifest their mutual assent. *Yakima County Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 388, 858 P.2d 245 (1993). Moreover, the terms assented to must be sufficiently definite. *Sandeman*, 50 Wn.2d at 541 (observing if a term is so "indefinite that a court cannot decide just what it means, and fix exactly the legal liability of the parties," there cannot be an enforceable agreement). Additionally, the contract must be supported by consideration to be enforceable. *King v. Riveland*, 125 Wn.2d 500, 505, 886 P.2d 160 (1994). Washington's requirements for valid contract formation adequately address the primary concern of other courts that have considered the enforceability of contracts to negotiate. As stated by one federal court, the primary concern is to "avoid trapping parties in surprise contractual obligations." *Teachers Ins. & Annuity Ass'n v. Tribune Co.*, 670 F. Supp. 491, 497 (S.D.N.Y. 1987).

In order to answer the certified questions, we must first determine whether a contract to negotiate was formed under the circumstances of this case. Xerox claims that there was no manifestation of mutual assent to be bound to specific standards of negotiating conduct.[10] Generally, manifestations of mutual assent will be expressed by an offer and acceptance. *City of Yakima*, 122 Wn.2d at 388. Keystone identifies letters between the parties' brokers that it contends are an offer, counter-offers, and acceptance. However, Keystone fails to identify an offer and acceptance to be bound to specific standards of negotiating conduct for the formation of a separate substantive contract.

Alternatively, Keystone alleges that statements made by Xerox's brokers regarding Xerox's intentions to proceed with the negotiations amount to an unconditional commitment to prepare the purchase and sale agreement that would have formalized its alleged commitment to sell the facility to Keystone. The relevant statements are contained in the April 10, 2001, letter from Kidder to Broderick. *See* App. First, Kidder states "Xerox is prepared to *negotiate* a Purchase and Sale Agreement with Keystone Development subject to two modifications to your Proposal." App. (emphasis added). At most, the statement is a manifestation of Xerox's intention to negotiate with Keystone. There is no objective manifestation by Xerox of an intent to be bound if Keystone accepts the

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[10] Whether there was mutual assent is normally a question of fact for the jury. *Sea-Van Invs. Assocs. v. Hamilton*, 125 Wn.2d 120, 126, 881 P.2d 1035 (1994). A question of fact may be determined as a matter of law where reasonable minds could reach but one conclusion. *Ruff v. King County*, 125 Wn.2d 697, 703-04, 887 P.2d 886 (1995) (quoting *Hartley v. State*, 103 Wn.2d 768, 775, 698 P.2d 77 (1985)).

modifications. *See Pac. Cascade Corp. v. Nimmer*, 25 Wn. App. 552, 556, 608 P.2d 266 (1980) (holding an intention to do something "is evidence of a future contractual intent, *not the present contractual intent essential to an operative offer*") (emphasis added). On the contrary, the statement evidences an intent not to be bound by expressly referencing the need for further negotiations. *See Arcadian Phosphates, Inc. v. Arcadian Corp.*, 884 F.2d 69, 72 (2d Cir. 1989) (holding "reference to a binding sales agreement to be completed at some future date" is evidence of a present intent *not* to be bound).

Second, Kidder states that if Keystone acknowledges acceptance of the modifications to its proposal "[w]e can then proceed immediately to draft the Purchase and Sale Agreement for review and execution." App. Again, this statement does not manifest a present contractual intent to be bound upon Keystone's acceptance. *See Nimmer*, 25 Wn.App. at 556. Rather, the statement is an objective manifestation of Xerox's intent not to be bound because of its express reference to a future binding agreement being "review[ed] and execut[ed]." App.; *see Arcadian*, 884 F.2d at 72.

We conclude that it is unnecessary to decide whether Washington will ever enforce a contract to negotiate in order to answer the first certified question. The exchange of letters with which we are presented does not constitute a contract to negotiate. The parties did not exchange promises to conform to a specific course of conduct during negotiations, such as negotiating in good faith, exclusively with each other, or for a specific period of time. Instead, the parties began negotiations to enter into a purchase and sale agreement. In the absence of objective manifestations of mutual assent to definite terms supported by consideration, no contract was formed. *See King*, 125 Wn.2d at 505; *City of Yakima*, 122

Wn.2d at 388; *Sandeman*, 50 Wn.2d at 541. There was never an agreement as to how the parties were required to proceed.

Keystone asks us to imply a duty to continue negotiations until a final agreement is reached. In fact, Keystone argues that the question before us is not whether the parties agreed to an enforceable duty to negotiate. Instead, it argues the question is "whether the negotiations between Keystone and Xerox had advanced to the point *where the law should impose on the parties a 'duty to go forward*[.]'"[11] We decline to create and impose a duty to go forward in the absence of an enforceable contract. No contract was formed between Keystone and Xerox. At best, the circumstances of this case present an implied agreement to agree. We adhere to our long standing jurisprudence that agreements to agree are unenforceable. *Sandeman*, 50 Wn.2d at 541-42; *Wharf Rest., Inc. v. Port of Seattle*, 24 Wn. App. 601, 609, 605 P.2d 334 (1979); *Johnson v. Star Iron & Steel Co.*, 9 Wn.App. 202, 206, 511 P.2d 1370 (1973).[12]

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[11] Br. of Keystone Land & Dev. Co. at 32 (emphasis added).

[12] Compare also Coleman v. St. Paul & Tacoma Lumber Co., 110 Wash. 259, 270, 188 P. 532 (1920) (holding letters did not form a contract when the objective purpose was "to open negotiations which might possibly lead to a contract") and *Weldon v. Degan*, 86 Wash. 442, 450, 150 P. 1184 (1915) (""'If any portion of the proposed terms [of the contract] are not settled or a mode agreed upon by which they may be settled, there is no agreement.'"" (quoting 9 Cyc. 245) (alteration in original)).

CONCLUSION

The circumstances of this case present us, at best, with an implied agreement to agree. We adhere to our long standing jurisprudence that agreements to agree are unenforceable. Consequently, our answer to the first certified question is no, Washington will not enforce a contract under the circumstances of this case. We do not reach the question of whether contracts to negotiate are enforceable under Washington contract law because this case does not present a contract to negotiate. We find it unnecessary to reach the second certified question concerning the measure of damages.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 02-35847

D.C. No. Cv-01-01018-MJP
Western District of Washington, Seattle

[Filed June 17, 2004]

KEYSTONE LAND & DEVELOPMENT COMPANY,	)
Plaintiff-Counter-Defendant-Appellant,	)
v.	)
XEROX CORPORATION,	)
Defendant-Counter-Claimant-Appellee.	)

ORDER

Before: TROTT, FISHER, and GOULD, Circuit Judges.

Before us is Keystone Land and Development Company's ("Keystone") "Motion for Clarification of Certification

Order," filed June 7, 2004. Xerox Corporation has filed a response in opposition to the motion.

From our perspective, the issue certified to the Washington State Supreme Court remains as we stated in our certification order:

> If the Washington State Supreme Court gives an opinion that it does not recognize a contract to negotiate in this case, we will affirm the district court on that basis. Conversely, if the Washington State Supreme Court decides to recognize a contract to negotiate in this case, we will reverse the district court's order granting summary judgment to Xerox. As we will explain if it is necessary, there are genuinely disputed material facts that would permit, though not compel, a rational jury to conclude that a contract to negotiate existed and that, if such a contract is recognized in this type of case, Xerox breached it. In this case, a trial will be necessary.

Keystone Land & Dev. Co. v. Xerox Corp., 353 F.3d 1093, 1098 (9th Cir. 2003).

Keystone asserts in its motion that the Washington State Supreme Court is hesitant to resolve the certified questions as we have framed them. Xerox asserts that the motion is untimely, that clarification is unnecessary, and that the requested clarification is unfair. We have reviewed the briefing presented by the parties on the motion, and also have reviewed the parties' argument presented before the Washington State Supreme Court. We acknowledge that there were some expressions of concern by members of the court to deciding the ultimate issue in this specific case, as opposed to providing a general statement of Washington contract law.

We reject Xerox's argument that the motion is untimely, for it does address issues of concern raised by the Washington State Supreme Court. As for whether clarification is necessary, we did frame our questions, as quoted above, to inquire about recognition of a contract to negotiate, and we further did ask for an opinion as applied to this case. We framed the issues in this way to make the certified question dispositive of the case, with the view that would make it more likely that the Washington State Supreme Court would be willing to accept certification, spend its valuable time, and express its view on the applicable Washington law of contract. At the same time, we did not intend to burden the Washington State Supreme Court with any issue that it does not wish to resolve.

Along these lines, in our prior certification order we explicitly said that "the Washington State Supreme Court... may in its discretion reformulate the questions." *Id.* (citing *Broad v. Mannesmann Anlagenbau AG,* 196 F.3d at 1076 (9th Cir. 1999)). In response to the motion to clarify, we direct the attention of the parties and the Washington State Supreme Court to this particular language, which ensures that the issues may be reframed in a manner entirely agreeable to the Washington State Supreme Court. We appreciate that it has taken the time on its crowded docket to accept certification, to address issues posed by this case, and to hear oral argument, with the aim to render an opinion.

If the Washington State Supreme Court wants to answer the question as we certified it, it will be dispositive of this appeal. Conversely, if the Washington State Supreme Court prefers to limit its opinion to advising whether, under Washington contract law, a contract to negotiate can be valid and enforceable, then we will apply that law in further proceedings in this appeal. Because our order contemplates

that the Washington Supreme Court has discretion to reformulate our questions to its liking, we will act in accord with whatever guidance on Washington law is given to us.

Beyond these clarifying comments, we see no need to further clarify the certified questions. In the interest of facilitating the Washington State Supreme Court's consideration of the state law question presented by this case, the motion for clarification is GRANTED IN PART and DENIED IN PART.

IT IS SO ORDERED.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Case No. 02-35847

[Filed December 31, 2003]

KEYSTONE LAND & DEVELOPMENT COMPANY, Plaintiff-Counter-Defendant-Appellant,	)
v.	)
XEROX CORPORATION, Defendant-Counter-Claimant-Appellee.	)

Before: Stephen S. Trott, Raymond C. Fisher, and Ronald M. Gould, Circuit Judges. Order by Judge Gould.

OPINION & ORDER

GOULD, Circuit Judge.

This diversity case arises from a contract dispute. Plaintiff Keystone Land & Development Company ("Keystone") claims that it formed two binding contracts with Defendant

Xerox Corporation ("Xerox"): a contract to buy a building owned by Xerox, and a contract to negotiate the terms of a Purchase and Sale Agreement for that building. Keystone filed suit for breach of contract in Washington state court and, to secure its claims, Keystone filed a *lis pendens* notice for the property. Xerox removed the case to federal court and filed a counterclaim for damages, and attorney's fees, caused by an allegedly improper *lis pendens*. The district court granted summary judgment to Xerox on its defense of the two contract claims asserted by Keystone, and also granted summary judgment to Xerox on its counterclaim. Keystone appealed these rulings. We had jurisdiction pursuant to 28 U.S.C. § 1291. In an opinion filed concurrently with this order, we affirmed the summary judgment dismissing Keystone's claim of a breach of contract to sell the building, and we reversed the summary judgment awarding damages to Xerox because of the *lis pendens*. This order certifies to the Washington State Supreme Court the remaining dispositive[13] question of state law before us, namely, whether Washington law may recognize a contract to negotiate in the circumstances presented by this appeal.

I

Before turning to the issue to be certified, we provide the following summary of facts. In early 2001, Xerox decided to sell and leaseback its facility in Tukwila, Washington. Xerox hired Jones Lang LaSalle ("Jones Lang") and Kidder Matthews and Sanger ("Kidder Matthews") to sell the

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[1] We conclude that whether a trial on the remaining contract claim in this case is necessary depends entirely upon the answer provided by the Washington State Supreme Court. The answer to our certified question is "necessary . . . to dispose of [our] proceedings." Wash. Rev. Code. § 2.60.020.

property. Xerox sent detailed information packets to prospective buyers, including Keystone. In a February 22, 2001 e-mail, Xerox requested a "signed Letter of Intent which includes the net purchase price and key deal points..." Keystone, through its real estate broker, Broderick Group, sent a letter (the "Offer Letter") dated March 8, 2001, that made an "Offer to Purchase" the property. The letter had several contingencies, including the "Execution of a Purchase and Sale Agreement with [sic] thirty (30) days from the execution of this letter of intent." Kidder Matthews replied on April 4, 2001, thanking Keystone for the "Offer" and, as "directed by Xerox," requested that Keystone submit a "final and best offer" for the property that addressed certain concerns. Keystone responded through a letter dated April 6th, 2001 by increasing its offering price. Referencing the March 8th letter, the April 6th letter stated that Keystone was "prepared to proceed towards completion of a mutually acceptable Purchase and Sale Agreement." In an April 10th letter, Xerox's local brokers wrote that, subject to two modifications, Xerox was "prepared to negotiate a Purchase and Sale Agreement with Keystone," and that Xerox would "proceed immediately to draft" the Agreement if Keystone accepted the modifications. Keystone accepted the modifications on April 13th.

Keystone prepared to inspect the property and Xerox's books and records concerning the property, reviewed documents, and arranged debt and equity financing. Xerox delivered documents to Keystone and hired legal counsel for drafting the Agreement. Xerox told Keystone that a draft was almost complete and would soon be ready for review. To this point, no employee of Keystone had discussed the transaction directly with any employee of Xerox; all communications were between the parties' brokers.

Xerox commenced its due diligence review. Because Xerox had seen other prospective property sales collapse when lenders had backed out after learning that the deal included a leaseback to Xerox, it requested assurances from Keystone's lenders that financing would be available. Faced with vague answers from Keystone's financier, a Key Bank officer, Xerox became concerned about Keystone's suitability as purchaser and landlord.

On April 25, 2001, the City of Tukwila, the main competitor of Keystone for the property, submitted a revised proposal to buy the building for $500,000 more than Keystone offered. Xerox then decided to withdraw from negotiations with Keystone. That was the end of negotiations between Keystone and Xerox.

Keystone filed suit in state court on June 20, 2001 and recorded a *lis pendens* against the Tukwila facility. The action was removed by Xerox to the United States District Court for the Western District of Washington. Xerox filed a Fed. R. Civ. P. 12(b)(6) motion, asserting that the complaint did not state a claim. That motion was denied. Xerox then filed an answer on October 4, 2001, and added a counterclaim for damages from the *lis pendens* filing. Keystone released the *lis pendens* when it filed an amended complaint on January 18, 2002. On cross-motions for summary judgment, the district court granted Xerox's motion for summary judgment in defense of Keystone's suit on March 14, 2002. On July 12, 2002, the district court, addressing cross-motions for summary judgment on Xerox's counter-claim, awarded summary judgment to Xerox. The district court certified both orders as final and Keystone appealed both summary judgment orders.

In an opinion accompanying this order, we have affirmed summary judgment for Xerox on Keystone's claim of breach of contract to sell the Tukwila building. In the same opinion, we reversed summary judgment for Xerox on the *lis pendens* counterclaim and ordered summary judgment for Keystone. We have deferred decision on the appeal of Keystone challenging the district court's grant of summary judgment rejecting Keystone's claim of breach of contract to negotiate.

II

We turn to the issue that is the basis of our certification order[14]: whether Washington law recognizes a contract to negotiate. We certify this question because we conclude that the Washington State Supreme Court has not yet answered definitively whether a contract to negotiate can be enforceable in the circumstances presented in this case.

On the one hand, arguing against the possibility of an agreement to negotiate a future contract, Washington courts have held explicitly that "an agreement to negotiate a contract in the future is nothing more than negotiations." *Pacific Cascade Corp. v. Nimmer*, 25 Wn.App. 552, 556, 608 P.2d 266 (1980) (citing *Johnson v. Star Iron & Steel Co.*, 9 Wn. App. 202, 206, 511 P.2d 1370 (1973)). *Johnson*, in turn, cites *Sandeman v. Sayres*, 50 Wn.2d 539, 314 P.2d 428 (1957) for its holding. *Sandeman* includes a statement that, "an agreement for an agreement, or in other words, an agreement to do something which requires a further meeting of the minds of the parties and without which it would not be

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[2] Even though this course of action was not suggested by either party, we may properly certify this question *sua sponte*. *See* Wash. Rev. Code.

complete is unenforceable [sic]." *Id.* at 541-42. If we take this language from *Sandeman* literally, it might be read to preclude Keystone's claim of breach of contract to negotiate. That agreement might be viewed as requiring some further meeting of the minds to reach an agreement that is enforceable.

But our analysis of *Sandeman* suggests to us that the answer we set forth above is not necessarily conclusive. *Sandeman* did not precisely reject contracts for negotiation. The *Sandeman* language that we cite above, to the effect that there can be no enforceable "agreement to do something which requires a further meeting of the minds of the parties," *id.*, is ambiguous as applied to an agreement to negotiate. The *Sandeman* language might be interpreted to preclude using a § 2.60.030(1) ("certification procedure may be invoked by a federal court upon its own motion ...."); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., No. 1*, 294 F.3d 1085, 1086 (9th Cir. 2002) (ordering certification *sua sponte*) contract to negotiate to enforce the incomplete substantive contract, but need not necessarily be read to preclude enforcing a contract to negotiate, with nothing enforced except a duty to negotiate in good faith.

There is also some affirmative authority that, at least when a contract has been formed, Washington courts have recognized that there can be a contractual obligation to negotiate further agreements in good faith. *See, e.g., Family Medical Bldg, Inc. v. Dept. of Soc. and Health Servs.*, 37 Wn.App. 662, 667, 684 P.2d 77 & n.2 (1984) ("that is, G.A. had a duty to make a good faith effort to negotiate a rental and a duty to determine in good faith if the rate was acceptable...there was [a promise by the G. A.] to agree to an acceptable rate."), *aff'd in part on this ground, rev'd in part on other grounds*, 104 Wn.2d 105, 702 P.2d 459 (1985). And

the concept of a contract to negotiate has been explicitly recognized by a concurring opinion from the Washington Supreme Court. *See Hedges v. Hurd*, 47 Wn.2d 683, 689, 289 P.2d 706 (1955) (Hill, J., concurring) ("It is my view that, as a result of such an earnest-money receipt and agreement, there is an implied agreement between the seller and the purchaser that they will negotiate in good faith the terms of the executory real-estate contract contemplated by the agreement...In the present case, appellant refused even to attempt to negotiate the executory real-estate contract contemplated by the agreement, and thereby she breached the contract she had made...").

A recent case addresses the subject, but in our view is also not conclusive. In *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 807 P.2d 356 (1991), the plaintiffs sued the bank for damages for not renegotiating or restructuring their loan. Because there was no "express term in the loan agreement [that] required the Bank to consider [the plaintiffs'] proposal," *id.* at 569, the bank had no good faith duty to consider the proposal, because the duty of good faith "arises only in connection with terms agreed to by the parties." *Id.* Because the "loan agreement did not obligate the bank to consider the [plaintiffs'] proposal," there was no breach of the duty of good faith when the bank did not consider the proposal. *Id.* at 574. Keystone urges that this reasoning implies that if the contract did contain a promise to consider the Badgetts' proposal, the bank would have had an obligation to consider the proposal in good faith. But there is another line of analysis in *Badgett* to the contrary. The Badgetts argued that when the bank's loan officer agreed to relay the plaintiffs' proposal to the loan committee, it created a contractual duty of the bank to consider the proposal. The court held that, "the Badgetts acknowledge that their proposal was just that -- a proposal, not an agreement -- and further negotiations were necessary.

[The loan officer's] presentation to the loan committee was a step in the negotiating process ... *If* [his] promise to negotiate is *unenforceable*, it follows that it cannot give rise to a contractual duty." *Id.* (citing *Sandeman v. Sayres*, 50 Wn.2d at 541-42 (1957) (emphasis added)).

Although the older Washington precedents discourage a conclusion that there can be a contract to negotiate, our uncertainty is heightened by the modern trend in contract law. Most jurisdictions recognize the enforceability of contracts to negotiate in an appropriate case. *See Copeland v. Baskin Robbins U.S.A.*, 96 Cal. App. 4th 1251, 117 Cal.Rptr.2d 875, 882 (Cal. Ct. App. 2002) ("most jurisdictions which have considered the questions have concluded that a cause of action will lie for a breach of a contract to negotiate the terms of an agreement."). *See also Venture Assoc. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 433 (7th Cir. 1993) (applying Illinois law); *Channel Home Ctrs. v. Grossman*, 795 F.2d 291, 298-300 (3rd Cir. 1986) (applying Pennsylvania law); *Chase v. Consol. Foods Corp.*, 744 F.2d 566 (7th Cir. 1984) (applying Illinois law); *Fickes v. Sun Expert, Inc.*, 762 F. Supp. 998, 1001 (D. Mass. 1991); *Thompson v. Liquichimica of America, Inc.*, 481 F. Supp. 365, 366 (S.D.N.Y. 1979); *Evans, Inc. v. Tiffany & Co.*, 416 F. Supp. 224, 239 (N. D. Ill. 1976); *Am. Broad. Cos. v. Wolf*, 52 N.Y.2d 394, 420 N.E.2d 363, 438 N.Y.S.2d 482 (N. Y. 1981); *Itek Corp. v. Chicago Aerial Industries, Inc.*, 248 A.2d 625, 629 (Del. 1968). *But see Budget Mktg., Inc. v. Centronics Corp.*, 927 F.2d 421 (8th Cir. 1991) (applying Iowa law). Many modern commentators also support this conclusion. *See* E. Allan Farnsworth, *Farnsworth on Contracts*, §3.26 at 363 (2d ed. 1998); Melvin Eisenberg, *Symposium on the Law in the Twentieth Century: The Emergence of Dynamic Contract Law*, 88 Cal. L. Rev. 1743, 1796-97 (2000); E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair*

Dealing and Failed Negotiations, 87 Colum. L. Rev. 217, 273 (1987); Charles Knapp, *Enforcing the Contract to Bargain*, 44 N.Y.U.L. Rev. 673, 728 (1969). *But see Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 96 F.3d 275, 276-81 (7th Cir. 1996).

Because this question of state contract law is not entirely settled in Washington, and because, if clarified definitively by the Washington State Supreme Court, the answer will have far-reaching effects on those who contract in, or are subject to, Washington law, we have concluded that an appropriate course of action for us is to certify this issue to the Washington State Supreme Court.[15]

If the Washington State Supreme Court gives an opinion that it does not recognize a contract to negotiate in this case, we will affirm the district court on that basis. Conversely, if the Washington State Supreme Court decides to recognize a contract to negotiate in this case, we will reverse the district court's order granting summary judgment to Xerox. As we will explain if it is necessary, there are genuinely disputed material facts that would permit, though not compel, a rational jury to conclude that a contract to negotiate existed and that, if such a contract is recognized in this type of case, Xerox breached it.[16] In this case, a trial will be necessary.

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[3] Whether to answer the certified question is within the discretion of the Washington State Supreme Court. *Broad v. Mannesmann Anlagenbau, A. G.*, 141 Wn.2d 670, 676, 10 P.3d 371 (2000).

[4] Thus, the certified question is dispositive for our appeal.

ORDER

In light of our foregoing discussion, and because the answer to these questions are "necessary . . . to dispose" of this appeal, Wash. Rev. Code § 2.60.020, we respectfully certify to the Washington State Supreme Court the following questions:

(1) Will Washington contract law recognize and enforce an agreement, whether implicit or explicit, between two or more parties to negotiate a future contract under the circumstances presented in this case?

(2) If such a contract can exist, what is the proper measure of damages for the breach of a contract to negotiate?

We do not intend our framing of these questions to restrict the Washington State Supreme Court's consideration of any issues that it determines are relevant. If the Washington State Supreme Court decides to consider the certified questions, it may in its discretion reformulate the questions. *Broad v. Mannesmann Anlagenbau AG*, 196 F.3d 1075 at 1076 (9th Cir. 1999).

If the Washington State Supreme Court accepts review of the certified questions, we designate appellant Keystone as the party to file the first brief pursuant to Wash. R. App. P. 16.16(e)(1).

The Clerk of Court is hereby ordered to transmit forthwith to the Washington State Supreme Court, under official seal of the United States Court of Appeals for the Ninth Circuit, a copy of this order and all relevant briefs and excerpts of record pursuant to Wash. Rev. Code §§ 2.60.010, 2.60.030 and Wash R. App. P. 16.16.

Further proceedings in this court on the certified questions are stayed pending the Washington State Supreme Court's decision whether it will accept review, and if so, receipt of the answer to the certified questions. The case is withdrawn from submission, in pertinent part, until further order from this Court. The panel will resume control and jurisdiction on the certified questions upon receiving an answer to the certified questions or upon the Washington State Supreme Court's decision to decline to answer the certified questions. When the Washington State Supreme Court decides whether or not to accept the certified questions, the parties shall file a joint report informing this court of the decision. If the Washington State Supreme Court accepts the certified questions, the parties shall file a joint status report every six months after the date of the acceptance, or more frequently if circumstances warrant.

It is so **ORDERED**.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CASE No. 02-35847

[Filed June 7, 2004]

KEYSTONE LAND & DEVELOPMENT COMPANY,	)
Plaintiff/Counter-Defendant-Appellant,	)
v.	)
XEROX CORPORATION,	)
Defendant/Counter-Claimant-Appellee.	)

APPEAL FROM ORDERS OF SUMMARY JUDGMENT FOR DEFENDANT ENTERED BY THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

NO. CV-01-01018-MJP

DECLARATION OF ERIC C. FRIMODT IN SUPPORT OF MOTION FOR CLARIFICATION OF CERTIFICATION ORDER

ERIC C. FRIMODT (WSBA #21938)
INSLEE, BEST, DOEZIE & RYDER, P.S.
777-108th Avenue N.E.
Bellevue, WA 98004
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ERIC C. FRIMODT hereby declares as follows:

1. I am over the age of 18 years, a resident of King County, Washington, and counsel for Keystone Land & Development Company in connection with these proceedings. I have personal knowledge of, and am competent to testify to, the matters set forth herein. The facts testified to herein are, to the best of my knowledge, true and correct.

2. I have carefully reviewed the video tape of the oral arguments heard on May 11, 2004, by the Washington State Supreme Court in connection with the questions certified to it by this Court. This video tape, which was produced by the Washington Public Affairs Network, appears to accurately represent the oral arguments. A copy of the video tape of the oral arguments is submitted with this Declaration.

3. Based on this video tape, I have prepared a verbatim transcript, to the best of my abilities, of certain selected portions of the statements and questions made by the justices of the Washington State Supreme Court. This transcript is presented in the following paragraphs of this Declaration.

4. The following represents a question posed by Chief Justice Gerry L. Alexander to me immediately after the commencement of oral arguments:

> You left out part of what you have. You have the certified questions in your brief. Number 1 says, "Will Washington contract law recognize and enforce an agreement, whether implicit or explicit, between two or more parties to negotiate a future contract." That's what you just read. But, it goes on to say, "under the circumstances of this case." Isn't that...Isn't that the federal judges' job to decide whether, what...what...how to apply the law under the circumstances of this case? Why was that in there?

5. The following represents a statement made by Chief Justice Gerry L. Alexander to Larry Smith, Xerox's counsel, regarding his concerns relating to the nature of the certified questions:

> If we answer this first question "no", what happens in the Ninth Circuit? That's the end of the case, isn't it? So we've decided the Ninth Circuit's case for them. I mean this part of the case. Maybe I'm the only one that is bothered by this. I would feel a lot better about this question if it was presented in a more generic way, rather than asking us to decide whether, does Washington contract law recognize and enforce an agreement between two or more parties to negotiate a future contract under the circumstances, and then they describe the circumstances, rather than say "under the circumstances of this case." We're supposed to look at the Ninth Circuit record and say, "you're out of court or you're in court"?

6. The following questions were raised by Justice Faith Ireland relating to the significance of the parties being "prepared to negotiate" a Purchase and Sale Agreement:

> Are you talking about the April 10th letter? Because on that letter you say, "Xerox is prepared to negotiate a purchase and sale agreement." I guess I don't know what "prepared" means exactly in that context. Is it kind of like "fixing" in the south?

7. Justice Barbara Madsen expressed the following concerns about how long Keystone and Xerox were required to continue negotiating:

> Counsel, what about the point your opposing counsel makes about the nebulous nature of this requirement that we would impose for negotiating. When he points out the possibility of building that into your agreement, that is for 90 days we will exclusively negotiate with your company, which puts a finite limit on it. In your first remarks you said your belief was that the obligation here is to negotiate all the way through to a deal. Is that what you are advocating? Or would it be, as counsel suggests, that you know there is a finite period of time during which we would want to imply that negotiations had to take place, or else we would be saying you have to come out with a deal at the end regardless?

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 4th day of June, 2004, at Bellevue, Washington.

/s/ _____
ERIC C. FRIMODT